

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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INDIAN HARBOR INSURANCE COMPANY,	:	Case No. 12 CIV 5787 (JGK)
	:	ECF Case
Plaintiff,	:	
	:	
-against-	:	
	:	
THE CITY OF SAN DIEGO,	:	Courtroom: 12B
	:	Judge: Hon. John G. Koeltl
Defendant.	:	Complaint Filed: July 27, 2012
	:	F.A.C. Filed: August 14, 2012
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**INDIAN HARBOR INSURANCE COMPANY'S RESPONSE TO CITY OF SAN DIEGO'S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF J. ROBERT MCMAHON IN SUPPORT OF CITY OF SAN DIEGO'S OPPOSITION TO INDIAN HARBOR'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Indian Harbor Insurance Company (“Indian Harbor”) respectfully submits this response to City of San Diego (“City”)’s objections to Indian Harbor’s evidence submitted in support of Indian Harbor’s motion for summary judgment.

The City has objected to Paragraph 5 of the Declaration of J. Robert McMahon, which provides that the Indian Harbor policy was issued from Exton, Pennsylvania, and was not issued or delivered in New York. This clearly is an issue of fact, not law. The City’s argument that Mr. McMahon’s statement “requires application of law to fact [and] statutory interpretation” conflates the fact issue of where the policy issued (which information Mr. McMahon supplied) and the application of that fact to New York law (which the briefing has done). Where a policy was issued and delivered have been analyzed as a matter of fact by New York courts. *See, e.g., Marino v. New York Tel. Co.*, 944 F.2d 109, 113 (2d Cir. N.Y. 1991) (“The record reveals that the policy was issued by Peerless, a New Hampshire corporation, through an insurance agent in Manchester, New Hampshire, to a Nashua, New Hampshire corporation, Jamco.”); *see also Schneider v. Canal Ins. Co.*, 1999 U.S. Dist. LEXIS 13618 (E.D.N.Y. Sept. 1, 1999) (“The

policy was issued by Canal, a South Carolina corporation, to Jimmy and Janis Ritter (doing business as Praise Trucking) of Apopka, Florida. Given the complete lack of evidence that the policy was delivered or issued for delivery in New York, Schneider may not maintain this action under Insurance Law § 3420(b)(1).”). Therefore, where the policy was issued is appropriately the subject of a declaration by a witness.

Mr. McMahon’s declaration states that he has personal knowledge of the facts listed therein, including that the policy was issued in Exton, Pennsylvania and not in New York. The City has not argued that this fact is not (or cannot be) within Mr. McMahon’s personal knowledge – nor would it have reason to do so – and has not articulated any reason why Mr. McMahon’s statement alone is insufficient to prove these facts. Mr. McMahon’s statements are therefore sufficient to establish that the policy was not issued in New York.

The City argues that the Indian Harbor policy does not support Mr. McMahon’s statement. However, the policy provides that Indian Harbor’s administrative office is in Connecticut, that its Home Office is in North Dakota, and that the First Named Insured and the broker are located in California. All of this provides support for Mr. McMahon’s statement that the policy was not issued in New York. Moreover, the City has not come forward with any contrary evidence.

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Indian Harbor respectfully requests that the Court overrule the City's objections to Paragraph 5 of Mr. McMahon's declaration.

Dated: March 13, 2013

Respectfully submitted,

**DUANE MORRIS LLP**

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